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10 **UNITED STATES BANKRUPTCY COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**

13 In re:

Case No: 21-51255-MEH

14 DUTCHINTS DEVELOPMENT, LLC,

Chapter 7

15
16
17 Debtor.
18

19 **UNITED STATES TRUSTEE'S REPORT OF**
20 **DISPUTED CHAPTER 7 TRUSTEE ELECTION**
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1 Tracy Hope Davis, the United States Trustee for Region 17 (the “U.S. Trustee”), by and
2 through her undersigned counsel, hereby files this Report of Disputed Chapter 7 Trustee Election
3 (the “Report”), under 28 U.S.C. § 586(a)(3), 11 U.S.C. § 702, and Fed. R. Bankr. P. 2003, with
4 respect to a trustee election (the “Chapter 7 Trustee Election”) conducted on March 25, 2022, at
5 12:00 p.m., in the above-captioned case of Dutchints Development, LLC (the “Debtor”).

6
7 In support of this Report, the U.S. Trustee requests that the Court consider the Declaration
8 of Kristin McAbee (“McAbee Declaration”) filed concurrently herewith.

9 SUMMARY OF THE DISPUTED ELECTION

10 This is a disputed election. For the reasons discussed more fully below, it is unclear whether
11 the election was valid within the meaning of Section 702 of the Bankruptcy Code. In order for a
12 determination to be made regarding whether the election was valid, the following threshold issues
13 require adjudication:
14

- 15 a. Do the creditors who requested the election meet the eligibility requirements under 11
16 U.S.C. § 702(a)(2) and Fed. R. Bankr. P. 2003(b)(3)?
- 17 b. If the election was properly requested and the creditors who requested the election met
18 the eligibility requirements, did qualified creditors holding at least 20 percent in amount
19 of the claims specified in Section 702(a) actually vote in the election?
- 20 c. Did any candidate receive the votes of creditors holding a majority in amount of the
21 claims held by qualified creditors that voted?
- 22 d. Has the Debtor raised any meritorious objections to the election?

23
24 In accordance with Fed. R. Bankr. P. 2003(d)(2), Kari Bowyer, P.O. Box 700096 San Jose,
25 CA 95170, will serve as the interim trustee pending resolution of this disputed election. Section II
26 below and the accompanying McAbee Declaration provide analyses of these issues and scenarios of
27 voting outcomes. Under Rule 2003(d)(2), unless a motion for resolution of the issues underlying the
28

dispute is timely filed within fourteen (14) days of the filing of this Report, Kari Bowyer will serve as the trustee in this case.

BACKGROUND

A. General

The Debtor commenced this case by filing a voluntary petition under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the “Bankruptcy Code”) on September 29, 2021 (the “Petition Date”).¹ See ECF No. 1.

The Debtor is a real estate development company, focused on the Bay Area, particularly Los Altos and Mountain View. See ECF Docket generally. Since the Petition Date, the Court has: (1) rejected the lease for real property located at 10100 Bubb Road, Cupertino, California 95014 and ordered the Debtor to surrender the property to Verse Two Properties, LLC (ECF No. 52); (2) granted relief from the automatic stay in connection with real property located at 5150 El Camino Real, Los Altos, California 94022 (ECF No. 69); and (3) granted relief from the automatic stay in connection with the Debtor’s 10% interest in real property located at 1226 Phyllis Avenue, Mountain View, California 94040 (ECF No. 72).

On November 22, 2021, the U.S. Trustee appointed an official committee of unsecured creditors (the “Committee”). ECF No. 63. On December 20, 2021, the U.S. Trustee amended the Committee appointment to add additional members. ECF No. 83. The Committee retained Shulman Bastian Friedman & Bui LLP as counsel. ECF Nos. 78 and 104.

On January 12, 2022, the U.S. Trustee filed a motion to appoint a chapter 11 trustee, or in the alternative, to convert the case to chapter 7 (the “U.S. Trustee’s Motion”). ECF No. 95. The U.S. Trustee’s Motion was not opposed. See ECF Docket generally. On February 11, 2022, following a

¹ The U.S. Trustee respectfully requests that the Court take judicial notice under Fed. R. Evid. 201, as made applicable by Fed. R. Bankr. P. 9017, of the Debtor’s Petition, Schedules, Statement of Financial Affairs, and other documents filed therewith, and any amendments thereto which are in the Court’s file in this case. The information contained in these documents, signed under penalty of perjury by Debtor’s representatives, are admissions of the Debtor pursuant to Fed. R. Evid. 801(d).

1 hearing, the Court granted the U.S. Trustee's Motion and entered an order converting the case to
2 chapter 7. ECF No. 127.

3 Upon conversion of the case to chapter 7, Kari Bowyer was duly appointed as the interim
4 chapter 7 trustee.² *Id.*

5 **B. The Debtor's Schedules**

6 The Debtor filed its schedules on October 28, 2021. ECF No. 39. Before conversion to
7 chapter 7, the Debtor filed amended schedules, including Schedule E/F (the "First Amended
8 Schedules"). ECF No. 66. On March 25, 2022, following conversion, the Debtor amended its
9 Schedule E/F a second time (the "Second Amended Schedules"). ECF No. 147. The Second
10 Amended Schedules include twenty-four claims listed as either contingent, unliquidated, or disputed.
11 *Id.* These claims were not previously disclosed on the Debtor's Schedules. *Id.*

12 **C. Section 341(a) Meeting Called & Relevant Appearances**

13 The 11 U.S.C. § 341 meeting of creditors in the Debtor's chapter 7 case was scheduled for
14 March 10, 2022 and was adjourned to March 25, 2022. *See* ECF Docket generally.

15 On March 25, 2022, at approximately 12:00 p.m., the duly appointed interim trustee, Kari
16 Bowyer, called the meeting of creditors, at which the Chapter 7 Trustee Election was requested. U.S.
17 Trustee Trial Attorney Elvina Rofael presided over the telephonic meeting and conducted the
18 Chapter 7 Trustee Election pursuant to 11 U.S.C. § 702 and Fed. R. Bankr. P. 2003(b). The following
19 individuals were present at the meeting during the election:

- 20 1) Elvina Rofael, Trial Attorney with the Office of the U.S. Trustee;
21 2) Kristin McAbee, Bankruptcy Analyst with the Office of the U.S. Trustee;

22 ² On February 9, 2022, seller and third parties in interest, John H. Bellicitti, as Trustee; Mary F. Driggs, as
23 Trustee; Robert J. Bellicitti, as Trustee; and Harry L. Bellicitti, Jr., as Trustee (the "Bellicitti Trustees") filed a motion
24 for a "comfort order" affirming that the automatic stay does not bar them from exercising rights and remedies under the
25 purchase agreement entered into on October 18, 2018 between the Bellicitti Trustees and the Debtor (the "Bellicitti
26 Trustees's Motion for Relief from Stay"). ECF No. 121. On April 6, 2022, Interim Trustee Bowyer filed an opposition
27 to the Bellicitti Trustees's Motion for Relief from Stay, seeking relief that will allow the estate to preserve its rights and
28 remedies to the extent they exist. ECF No. 157. On April 7, 2022, the Court granted the Bellicitti Trustees's Motion for
Relief from Stay pursuant to 11 U.S.C. §§ 362(d)(1) and 362(d)(2). *See* ECF Docket generally.

- 3) Amber K. Gill of Macdonald Fernandez LLP, counsel for the Debtor;
- 4) Vahe Tashjian, the Debtor's responsible individual;
- 5) Kari Bowyer, interim chapter 7 trustee;
- 6) Jack Praetzellis of Fox Rothschild, counsel for the interim chapter 7 trustee;
- 7) Michael Sweet of Fox Rothschild, counsel for the interim chapter 7 trustee;
- 8) Robert N. Burmeister of Robert N. Burmeister Law Offices, on behalf of Richard Tod
Spieker and Catherine R. Spieker;
- 9) Wendy W. Smith of Binder & Malter LLP, on behalf of Thomas Paré, Paul Harms,
Johanna Fogl, and Catherine Hung;
- 10) Thomas Paré;
- 11) Catherine Hung;
- 12) Johanna Fogl;
- 13) Paul Harms;
- 14) Badi Enayati;
- 15) Cathy Ettenger;
- 16) Sandra Clow;
- 17) Biao Chen;
- 18) Gary B. Laine;
- 19) James Payne on behalf of Verse Two Properties, LLC;
- 20) Kent Fritz;
- 21) Jiang Bian;
- 22) Wei Bi on behalf of Ruyi International, LLC;
- 23) Milton Grinberg, Trustee of the Grinberg Family Trust;
- 24) Meyer Grinberg;
- 25) Yuqing Zhou;

- 1 26) Irene Jeanette Gary;
- 2 27) Hui Chen;
- 3 28) Janet Bocek on behalf of herself and APN4, LLC;
- 4 29) Chunqing Cheng;
- 5 30) Michael Leong;
- 6 31) Kim Parker;
- 7 32) Leonard Trejo;
- 8 33) Kathryn Morton;
- 9 34) Farshid Sabet on behalf of The Sabet Revocable Family Trust;
- 10 35) Yakira Heyman;
- 11 36) Rebecca Heyman;
- 12 37) David Heyman;³
- 13 38) Tod Fukushima and Lourdes Martinez;⁴
- 14 39) Susan B. Luce of Diemer & Wei, LLP on behalf of Rishi Bhargava and Shweta Goyal;
- 15 40) Monique D. Jewett-Brewster of Hopkins & Carley, counsel for the Bellicitti Trustee;
- 16 41) Grace Lee of Meylan Davitt Jain Arevian & Kim LLP, counsel for Interested Parties Eric
- 17 Kutcher and Lauren Kutcher; and
- 18 42) Stephanie A. Pittaluga of Hall Griffin LLP, counsel for Orange Coast Title Company of
- 19 Northern California.

20 The Chapter 7 Trustee Election was conducted using Ms. Bowyer's conference line listed on

21 the Court's website and the election concluded at approximately 4:40 p.m.⁵ A copy of the transcript

22 ³ David Heyman left the Chapter 7 Trustee Election early, citing a pre-existing conflict and time constraint.

23 ⁴ Tod Fukushima and Lourdes Martinez left the Chapter 7 Trustee Election early, citing a pre-existing conflict

24 and time constraint.

25 ⁵ There was one issue with the technology during the Chapter 7 Trustee Election. Towards the end of the call,

26 the conference line disconnected while Ms. Ettenger, Ms. Gill, and Ms. Luce were discussing the candidates. *See*

27 Dutchints Election Transcript, **Exhibit A**, pp. 157-159 and McAbee Declaration ¶ 5. However, Ms. Ettenger, Ms. Gill,

28 and Ms. Luce rejoined the conference call and continued with their discussion. *Id.* The Chapter 7 Trustee Election

concluded shortly thereafter. *See* Dutchints Election Transcript, **Exhibit A**, generally.

for the Chapter 7 Trustee Election is attached as **Exhibit A** to the McAbee Declaration (the “Dutchints Election Transcript”).

D. The Election

At the meeting, the following creditors voted for Richard Marshack, 870 Roosevelt, Irvine, CA 92620, to serve as the permanent chapter 7 trustee:

Creditor	Proof of Claim Amount	Ballot Amount
APN4, LLC	\$2,747,000	\$2,747,000
Badi Enayati	\$772,584	\$772,584
Biao Chen	\$205,000	\$205,000
Catherine Hung	\$545,286.46 ⁶	\$545,286.46
Cathy Ettenger	\$500,741.09	\$500,741.09
Chunqing Cheng	\$212,500	\$212,500 ⁷
Jiang Bian	\$531,500	\$531,500
David Heyman	\$100,000	\$100,000
Gary B. Laine	\$868,958	\$868,958
Hui Chen	\$170,000	\$170,000
Irene Jeanette Gary	\$222,765.46	\$222,765.46
Irwin and Yakira Heyman	\$1,119,328	\$1,119,328
Janet Bocek	\$1,492,037	\$1,492,037
Johanna Fogl	POC #28: \$300,000 POC #33: \$425,000	POC #28: \$300,000 ⁸ POC #33: \$425,000
Kathryn Morton ⁹	\$100,000	\$100,000

⁶ According to Ms. Hung, POC #34 was amended by POC #52. *See* Dutchints Election Transcript, **Exhibit A**, pp. 38-39.

⁷ The Debtor verbally disputed this claim at the Chapter 7 Trustee Election. *See* Dutchints Election Transcript, **Exhibit A**, pp. 145-149. However, the claim is not listed on the Debtor’s First or Second Amended Schedules. *See* ECF Nos. 66 and 147.

⁸ The Debtor listed POC #28 as an unliquidated and disputed claim on the Second Amended Schedules. ECF No. 147. At the Chapter 7 Trustee Election, the Debtor verbally objected to POC #33. *See* Dutchints Election Transcript, **Exhibit A**, pp. 58-63. The Debtor did not verbally object to POC #28. *Id.*

⁹ Ms. Morton returned a ballot without a nominee/candidate listed. *See* **Exhibit B**, p. 16. However, she appeared at the Chapter 7 Trustee Election and verbally voted for Mr. Marshack. *See* Dutchints Election Transcript, **Exhibit A**, pp. 101-107.

Kent Fritz	\$171,870	\$171,870
Kim Parker	\$1,195,000	\$1,195,000
Leonard Trejo and Shenghua Liu	\$437,500	\$437,500
Meyer Grinberg	\$75,000	\$75,000
Michael Leong	\$382,025.78	\$382,025.78
Milton Grinberg, Trustee of the Grinberg Family Trust	\$200,000	\$200,000
Paul Harms	\$356,619.08	\$356,619 ¹⁰
Rebecca Heyman	\$170,000	\$170,000
Richard Tod Spieker and Catherine R. Spieker ¹¹	\$2,838,745.60	\$2,838,745.60
Ruyi International, LLC	\$212,500	<i>No ballot returned</i> ¹²
Sandra Clow	\$717,252	\$717,252
Farshid Sabet (The Sabet Revocable Family Trust)	\$2,396,203	\$2,396,203
Tod Fukushima and Lourdes Martinez	\$114,683.27 (unsecured amount)	\$114,683.27 (unsecured amount)
Thomas Paré	POC #7: \$118,333.33 POC #23: \$662,664.77	POC #7: \$118,333.33 POC #23: \$522,664.77 ¹³
Verse Two Properties, LLC	\$3,533,897.84	\$3,533,897.84
Yuqing Zhou	\$196,250	\$196,250

Copies of the above-referenced ballots are attached as **Exhibit B** to the McAbee Declaration. Mr. Marshack was not present at the meeting.

The following creditor voted for Kari Bowyer, P.O. Box 700096 San Jose, CA 95170, the interim chapter 7 trustee:

¹⁰ The Debtor did not object to Paul Harms's claim at the Chapter 7 Trustee Election. *See* Dutchints Election Transcript, **Exhibit A**, pp. 49-52.

¹¹ Counsel Robert Burmeister of Robert N. Burmeister Law Offices appeared on behalf of creditors Richard Tod Spieker and Catherine R. Spieker. The returned ballot was signed by Mr. and Ms. Spieker. *See* Dutchints Election Transcript, **Exhibit A**, pp. 131-136 and **Exhibit B**, p. 25.

¹² This Office reached out to Wei Bi to inquire about the outstanding ballot. *See* McAbee Declaration ¶ 6. As of the filing of this Report, Mr. Bi has not returned a ballot. *Id.*

¹³ Mr. Paré's ballot lists the claim amount for POC #23 as \$522,664.77. *See* **Exhibit B**, p. 29. POC #23 is listed as \$662,664.77. *See* claims register generally. Where discrepancies arise, this Report used the amount listed on the proof of claim.

Creditor	Proof of Claim Amount	Ballot Amount
Rishi Bhargava	\$944,188 (unsecured amount)	\$944,188 ¹⁴ (unsecured amount)

A copy of the above-referenced ballot is attached as **Exhibit C** to the McAbee Declaration.

E. Objections

Several verbal objections were raised by the Debtor regarding the creditors' eligibility to request an election. *See Exhibit A*. Specifically, the Debtor largely disputed the claims as: (i) being owed by a separate entity that is not the Debtor or (ii) being litigated in state court, with counterclaims pending.¹⁵ *See Dutchints Election Transcript, Exhibit A*, pp. 17-20; 25-28; 32; 36-37; 41-43; 45-46; 49; 56-58; 61-63; 66-68; 71-72; 77-80; 86; 90-92; 95-97; 100-101; 104-107; 112; 118-119; 122; 127-130; 134-136; 139-143; 144-145; 148; 151; and 164-165. According to the Debtor, several creditors invested into other entities, not the Debtor, such as 5150 ECR Group, LLC;¹⁶ DD 570 S. Rengstorff Group, LLC; and Flip Fund, LLC. *Id.* Therefore, according to the Debtor, the debts may be owed by another entity. *Id.* The Debtor has not filed a formal objection to any of these claims. *See ECF Docket generally*. While the Debtor listed the claim held by Rishi Bhargava and Shweta Goyal as disputed on the Second Amended Schedules, the Debtor did not object to the election request, the proof of claim, or proxies submitted by these creditors. *See Dutchints Election Transcript, Exhibit A*, pp. 154-161. The Debtor also did not object to Paul Harms's election request, or Johanna Fogl's claim #28. *See Dutchints Election Transcript, Exhibit*

¹⁴ The Debtor did not verbally object to this creditor's request to vote at the Chapter 7 Trustee Election, but the Debtor listed this creditor's claim as "disputed" on the Second Amended Schedules. ECF No. 147 and *see Dutchints Election Transcript, Exhibit A*, pp. 154-161. Additionally, counsel Susan Luce of Diemer & Wei, LLP was present at the Chapter 7 Trustee Election. The returned ballot was signed by Rishi Bhargava. *See Dutchints Election Transcript, Exhibit A*, pp. 154-161 and **Exhibit C**.

¹⁵ Ms. Gill objected to Hui Chen; Verse Two Properties, LLC; and Sandra Clow's eligibility to request and vote in an election on the grounds that the Debtor did not receive advance notice of their intent to request an election; however, she did not provide any legal authorities in support of this objection. *See Dutchints Election Transcript, Exhibit A*, pp. 118-119; 127-129; and 139-140. *See also* 11 U.S.C. § 702, and Fed. R. Bankr. P. 2003 (no mention that parties must provide advance notice to the debtor that they intend to request an election of a trustee).

¹⁶ On September 14, 2021, 5150 ECR Group, LLC filed for bankruptcy in the Northern District of California. *See ECF Docket generally*, case no. 21-51196. On October 13, 2021, Judge Johnson dismissed the bankruptcy case with a 180-day bar to refiling. *Id.* at ECF No. 46.

1 A, pp. 49-52 and 58-63. Further, the Debtor raised concerns over the nomination of Mr. Marshack
2 after several creditors disclosed at the Chapter 7 Trustee Election that former counsel to the
3 Committee, Leonard Shulman, had recommended Mr. Marshack as the chapter 7 trustee and
4 circulated Mr. Marshack's resume to the Committee. *See e.g.*, Dutchints Election Transcript, **Exhibit**
5 **A**, pp. 11-16; 49-52; 69-72; 112; and 155-161.

6
7 The Office of the United States Trustee presided over the meeting and informed parties in
8 attendance that the U.S. Trustee would be filing a report of disputed election. *See* Dutchints Election
9 Transcript, **Exhibit A**, pp. 167-168.

10 **I. RELEVANT AUTHORITIES**

11 Section 702 of the Code governs requests to elect a chapter 7 trustee. It provides:

12 (a) A creditor may vote for a candidate for trustee only if such creditor –

13
14 (1) holds an allowable, undisputed, fixed, liquidated, unsecured claim
15 of a kind entitled to distribution under sections 726(a)(2), 726(a)(3),
16 726(a)(4), 752(a), 766(h), or 766(i) of this title;

17 (2) does not have an interest materially adverse, other than an equity
18 interest that is not substantial in relation to such creditor's interest as a
19 creditor, to the interest of creditors entitled to such distribution; and

20 (3) is not an insider.

21
22 (b) At the meeting of creditors held under section 341 of this title, creditors
23 may elect one person to serve as trustee in the case if election of a trustee is
24 requested by creditors that may vote under subsection (a) of this section, and
25 that hold at least 20 percent in amount of the claims specified in subsection
26 (a)(1) of this section that are held by creditors that may vote under subsection
27 (a) of this section.

28 (c) A candidate for trustee is elected trustee if –

1 (1) creditors holding at least 20 percent in amount of the claims of a
2 kind specified in subsection (a)(1) of this section that are held by
3 creditors that may vote under subsection (a) of this section vote; and
4 (2) such candidate receives the votes of creditors holding a majority in
5 amount of claims specified in subsection (a)(1) of this section that are
6 held by creditors that vote for a trustee.
7

8 11 U.S.C. § 702. The purpose of Section 702 is to ensure that an election is creditor-driven, rather
9 than attorney-driven. *In re Michelex*, 195 B.R. 993, 1003 (Bankr. W.D. Mich. 1996); *In re Blanchard*
10 *Mgmt. Corp.*, 10 B.R. 186, 188 (Bankr. S.D.N.Y. 1981) (“[t]he procedure under the Code makes it
11 more difficult for a trustee to be elected unless there is actual creditor interest in the case. The Code’s
12 20 percent requirement discourages attorney control and attempts to revitalize the idea of true
13 creditor control”). Materially adverse interests may include a setoff claim or substantial equity
14 interest. *See Waldschmidt v. Siva Truck Leasing, Inc. (In re Lang Cartage Corp.)*, 20 B.R. 534, 536
15 (Bankr. E.D. Wis. 1982) (creditors ineligible after receiving a voidable preferential transfer); *In re*
16 *Qmect, Inc.*, No. 04-41044, 2007 WL 219942, at *7-8 (Bankr. N.D. Cal. 2007) (holder of substantial
17 equity interest in relation to holder’s creditor interest may not vote).
18
19

20 In chapter 7 cases, Fed. R. Bankr. P. 2003(b)(3) governs the right to vote in a trustee election.
21 Bankruptcy Rule 2003(b)(3) provides:

22 (3) Right to Vote. In a chapter 7 liquidation case, a creditor is entitled
23 to vote at a meeting if, at or before the meeting, the creditor has filed a
24 proof of claim or a writing setting forth facts evidencing a right to vote
25 pursuant to § 702(a) of the Code unless objection is made to the claim
26 or the proof of claim is insufficient on its face. In the event of an
27 objection to the amount or allowability of a claim for the purpose of
28 voting, unless the court orders otherwise, the United States trustee shall

1 tabulate the votes for each alternative presented by the dispute and, if
2 resolution of such dispute is necessary to determine the result of the
3 election, the tabulation for each alternative shall be reported to the
4 court.

5 Fed. R. Bankr. P. 2003(b)(3).
6

7 In chapter 7 cases, a creditor must file a proof of claim for the claim to be allowed, except as
8 provided in Rules 1019(3), 3003, 3004, and 3005. *See* Fed. R. Bankr. P. 3002(a). A claim for which
9 a proof of claim is filed pursuant to Section 501 is deemed allowed, unless a creditor or party in
10 interest objects to it. *See* 11 U.S.C. § 502. A properly filed and executed proof of claim constitutes
11 *prima facie* evidence of that claim's validity. Fed. R. Bankr. P. 3001(f); 3003(b)(1). Section 702
12 requires for voting purposes that the claim be (*inter alia*) allowable, undisputed, fixed, liquidated,
13 and unsecured. *See* 11 U.S.C. § 502(a). When a proof of claim is filed before or at a meeting of
14 creditors, the proof of claim supersedes the schedules. *See Michelex*, 195 B.R. at 1008. A claim is
15 disputed if the debtor has listed it as such on the bankruptcy schedules or if a party in interest has
16 filed a written objection to the claim and that objection has not been overruled or the claim
17 temporarily allowed. *Id.* However, because claims are often not filed or presented until the meeting
18 of creditors, a written objection may not be necessary for the claim to be deemed disputed, provided
19 an oral objection is made to the claim at the meeting or prior to voting. *See, e.g., In re Sforza*, 174
20 B.R. 656, 658 (Bankr. D. Mass 1994) (holding that debtor's attorney's statement at meeting of
21 creditors that creditor's claim was subject to counterclaim in state court litigation rendered claim
22 disputed for voting purposes, but that a frivolous objection cannot be allowed to deprive a creditor
23 of the right to call for an election of a trustee).
24
25
26

27 Once the election is properly requested, Section 702(c)(1) requires that qualified creditors
28 holding at least 20 percent in amount of the claims specified in Section 702(a) actually vote in the
election for the election to be valid. *In re Barkany*, 542 B.R. 662, 682 (Bankr. E.D.N.Y. 2015);

1 *Michelex*, 195 B.R. at 998-99. If the election is valid, the candidate who receives a majority of the
2 votes by amount of claim is elected trustee. *Barkany*, 542 B.R. at 682; *Blanchard Mgmt.*, 10 B.R. at
3 188.

4 Federal Rule of Bankruptcy Procedure 2003(d)(2) governs “disputed elections” and
5 provides, in relevant part:

6 (2) Disputed Election. If the election is disputed, the United States [T]rustee shall
7 promptly file a report stating that the election is disputed, informing the court of the
8 nature of the dispute, and listing the name and address of any candidate elected under
9 any alternative presented by the dispute Pending disposition by the court of a
10 disputed election for trustee, the interim trustee shall continue in office. Unless a
11 motion for resolution of the dispute is filed no later than 14 days after the United States
12 trustee files a report of disputed election, the interim trustee shall serve as trustee in
13 the case.
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16 Fed. R. Bankr. P. 2003(d)(2).

17 **II. ANALYSIS, DISCUSSION AND SUMMARY OF ALTERNATIVE OUTCOMES**

18 To determine whether the election was properly requested, the Court must ascertain:

- 19
- 20 a. Do the creditors who requested the election meet the eligibility requirements under 11
21 U.S.C. § 702(a)(2) and Fed. R. Bankr. P. 2003(b)(3)?
- 22 b. If the election was properly requested and the creditors who requested the election met
23 the eligibility requirements, did qualified creditors holding at least 20 percent in amount
24 of the claims specified in Section 702(a) actually vote in the election?
- 25 c. Did any candidate receive the votes of creditors holding a majority in amount of the
26 claims held by qualified creditors that voted?
- 27 d. Has the Debtor raised any meritorious objections to the election?
28

1 If the Court determines that the election was not properly requested, its analysis may stop
2 and the interim trustee will become the permanent chapter 7 trustee. *See* 11 U.S.C. § 702(d); Fed. R.
3 Bankr. P. 2003(d)(2). If, however, the Court determines that the election was properly requested, it
4 must then resolve whether the creditors voting in the election were eligible to vote and whether the
5 claims voted are at least 20 percent of all claims held by eligible creditors. *Id.* In calculating the
6 universe of claims eligible to vote in a trustee election and the 20 percent threshold, the Court must
7 determine the eligibility of creditors not only requesting the election, but also those creditors who
8 voted or did not participate at all. *Id.* Next, the Court must determine whether any candidate won a
9 majority in amount of the claims held by eligible voting creditors. *Id.* In addition, if the Debtor has
10 raised any other objections to the election, the Court must determine whether such objections are
11 valid.
12

13 **A. Did a Quorum Request an Election?**

14 In order to determine if an election request is sufficient, the Court must first determine the
15 universe of eligible claims (generally, allowable, undisputed, fixed, liquidated, unsecured claims).
16 Next, the Court has to determine if the creditors requesting an election hold claims aggregating 20%
17 of the amount of the universe of such claims. *See* 11 U.S.C. § 702(b). This interpretation also
18 comports with the policy underlying the enactment of Section 702(b), namely, “to insure that a
19 trustee is elected only in cases in which there is true creditor interest, and to discourage election of
20 a trustee by attorneys for creditors.” H.R. Rep. No. 595, 95th Cong., 1st Sess. 102 (1977).
21

22 Here, the Debtor verbally objected to all but three creditors’ eligibility to request an election.
23 *See* Dutchints Election Transcript, **Exhibit A**, pp. 49-52; 58-63; and 154-161. Specifically, the only
24 election requests to which the Debtor did not verbally object to were those made by: (1) Paul Harms,
25 claim #8; (2) Johanna Fogl, claim #28; and (3) Rishi Bhargava and Shweta Goyal, claim #32. *Id.*
26 The Debtor verbally objected to the remaining creditors’ requests for an election and/or listed those
27 creditors’ claims as either contingent, unliquidated, or disputed on the Second Amended Schedules.
28

1 See ECF No. 147. The issue of whether a quorum requested an election is dependent upon whether
2 the Court sustains the Debtor's articulated objections to the creditors' eligibility to request an
3 election. If the objected claims are not included in the universe of claims, the quorum requirement
4 is not met and there is not a proper election request.

5 The Debtor has not filed a formal objection to any of these claims. See ECF Docket generally.
6 However, some courts have found that no formal objection is required so long as the objection is not
7 frivolous. See, e.g., *In re Sforza*, 174 B.R. at 658 (holding that debtor's attorney's statement at
8 meeting of creditors that creditor's claim was subject to counterclaim in state court litigation
9 rendered claim disputed for voting purposes, but a frivolous objection cannot be allowed to deprive
10 a creditor of its right to call for an election of a trustee); *In re Valentine*, 296 B.R. 384, 386 (Bankr.
11 E.D. Va. 2001) ("a written objection is not required because raising an oral objection merely
12 preserve[s] determination of the issue of eligibility for the Court by way of the [U.S.] Trustee's
13 report of the disputed election and a motion timely filed, both as provided in Rule 2003(d)") (quoting
14 *In re Sforza*, 174 B.R. at 658). Further, Fed. R. Bankr. P. 2003(b)(3) provides that "a creditor is
15 entitled to vote at a meeting if, *at or before the meeting*, the creditor has filed a proof of claim or a
16 writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection
17 is made to the claim or the proof of claim is insufficient on its face." Fed. R. Bankr. P. 2003(b)(3)
18 (emphasis added). Similarly, courts have acknowledged that "even an oral objection made at the
19 meeting of creditors is sufficient to place the claim in dispute as long as the court finds that the basis
20 for the objection is not frivolous." *In re Qmect, Inc.*, 2007 WL219942, at *7-8 (citing *In re Valentine*,
21 296 B.R. at 386).

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26 **i. Calculation of the Universe of Claims and the 20 Percent Requirement**

27 To determine whether the eligible requesting creditor(s) meet the 20 percent threshold of
28 Section 702(a), a universe of eligible creditors must be established. In determining whether the 20%
requirement to elect a trustee has been met, courts have adopted a variety of methodologies. For

1 example, one view is that the 20% is determined simply by reference to the proofs of claims actually
2 on file as of the meeting. *In re Lake State Commodities, Inc.*, 173 B.R. 642 (Bankr. N.D. Ill. 1994).
3 The other view not only considers the filed claims, but also the debtor's schedules. *In re Michelex*,
4 195 B.R. at 993 (finding that "[w]hen a proper proof of claim is filed before, or at, the § 341 meeting,
5 it supersedes the debtor's schedules. The universe of claims must be adjusted by the proofs of claims
6 actually filed"); *see also Am. Eagle Mfg., Inc. v. N.C. Mach., Inc. (In re Am. Eagle Mfg., Inc.)*, 231
7 B.R. 320, 329-31 (B.A.P. 9th Cir. 1999) (affirming bankruptcy court's use of the *Michelex* approach
8 in calculating the "universe of claims" for purposes of § 702 by using the debtor's schedules as
9 modified by proofs of claim on file).
10

11 Here, the U.S. Trustee cannot determine if 20% of eligible voters called for the trustee
12 election as required under § 702 because the Debtor objected to all but three creditors' election
13 requests at the Chapter 7 Trustee Election. *See* Dutchints Election Transcript, **Exhibit A**, pp. 49-52;
14 58-63; and 154-161. Further, the Debtor noted on the record that the election was disputed on the
15 grounds that most of the claims filed in the case were debts owed by another entity, not the Debtor,
16 or were subject to ongoing litigation. *See e.g.*, Dutchints Election Transcript, **Exhibit A**, pp. 17-20;
17 25-28; 32; 36-37; 41-43; 45-46; 49; 56-58; 61-63; 66-68; 71-72; 77-80; 86; 90-92; 95-97; 100-101;
18 104-107; 112; 118-119; 122; 127-130; 134-136; 139-143; 144-145; 148; 151; and 164-165. These
19 factual and legal issues must be adjudicated in order to determine whether the 20 percent threshold
20 was met.
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23 **ii. Election Scenarios**
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25 While not possible to present every conceivable scenario given the fact that the Court may
26 reach different conclusions, below are a few possible scenarios based on the facts of this case and
27 the information obtained from creditors in connection with this election to calculate the threshold
28 percentages:

1. Scenario #1

Under the first scenario, reference is made solely to the Second Amended Schedules filed on March 25, 2022, pursuant to Fed. R. Bankr. P. 1009. Rule 1009(a).

Fed. R. Bankr. P. 1009(a) provides that “[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.” The 1983 Advisory Committee Note accompanying the rule explains that the rule demonstrates a “permissive approach” to amendments. *See also In re Magallanes*, 96 B.R. 253, 256 (9th Cir. BAP 1988) (“[a]mendments are and should be liberally allowed at any time absent a showing of bad faith or prejudice to third parties”).

Under this scenario, the U.S. Trustee calculates the minimum threshold for requesting the election and voting in the election to be 20% of the amount of non-priority unsecured debts not held by insiders, as set forth only on Schedule F, and not including debts designated as contingent, unliquidated, or disputed. *See* McAbee Declaration ¶ 8 and **Exhibit D, Scenario #1**.

According to the U.S. Trustee’s calculations, total qualifying scheduled unsecured claims aggregate \$7,274,981.42. *Id.* Twenty percent of that amount equals \$1,454,996.28. *Id.* Under this scenario, the only eligible claim was a \$300,000 claim held by Paul Harms, which claim amount does *not* satisfy the 20% minimum threshold or the approximately \$1,454,996.28 minimum dollar amount of eligible claims requesting the election and voting under Section 702. *Id.* Under scenario #1, the election would not have been authorized under Section 702 and the interim trustee, Kari Bowyer would become the permanent chapter 7 trustee. *Id.*

a. Scenario #1A

Alternatively, if the Court determines that the Debtor’s verbal objections are invalid, then it appears that all scheduled unsecured non-priority and non-insider claims were eligible to request the election and vote under Section 702. *See* McAbee Declaration ¶ 8 and **Exhibit D, Scenario #1A**. According to the U.S. Trustee’s calculations, total qualifying scheduled unsecured claims under this

1 scenario aggregate \$27,795,270.47.¹⁷ *Id.* Twenty percent of that amount equals approximately
2 \$5,559,054.09. *Id.* Under this scenario, all scheduled, unsecured, non-priority, and non-insider
3 claims were deemed eligible to request and vote in the election.¹⁸ *Id.* The aggregate claim amount
4 for the voting creditors is \$15,409,616.51, which *does* satisfy the \$5,559,054.09 minimum threshold.
5 *Id.* Under scenario #1A, the election would have been authorized under Section 702 and Richard
6 Marshack would become the permanent chapter 7 trustee. *Id.*

8 **b. Scenario #1B**

9 The Court could also determine that, although the Debtor listed the claims of Johanna Fogl,
10 claim #28 and Rishi Bhargava and Shweta Goyal, claim #32 as disputed and unliquidated on the
11 Second Amended Schedules, the Debtor did not verbally object to these claims. In fact, when asked
12 whether anyone objected to these claims, the Debtor responded that it has no objection to the Fogl
13 claim #28. *See* Dutchints Election Transcript, **Exhibit A**, pp. 58-63. In addition, the Debtor was
14 silent and did not object to the Bhargava and Goyal claim #32. *See* Dutchints Election Transcript,
15 **Exhibit A**, pp. 154-161.

16 According to the U.S. Trustee's calculations, total qualifying scheduled unsecured claims
17 under this scenario aggregate \$8,525,219.42. *See* McAbee Declaration ¶ 8 and **Exhibit D, Scenario**
18 **#1B**. Twenty percent of that amount equals approximately \$1,705,043.88. *Id.* Under this scenario,
19 eligible claims were: (1) a \$300,000 scheduled claim held by Paul Harms; (2) a \$300,000 scheduled
20 claim held by Johanna Fogl; and (3) a \$950,238 scheduled claim held by Rishi Bhargava and Shweta
21 Goyal. *Id.* The aggregate claim amount for these three claims is \$1,550,238.00, which does *not*
22 satisfy the 20% minimum threshold or the approximately \$1,705,043.88 minimum dollar amount of
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26 ¹⁷ The "voting creditors' claims" calculation of \$27,795,270.47 includes ballots provided by David Heyman
27 and Tod Fukushima/Lourdes Martinez. These votes are counted because, while these creditors attended the Chapter 7
28 Trustee Election and left early without verbally requesting an election and voting, they returned a ballot. Although the
U.S. Trustee is including these claims under scenario #1A, under a strict reading of 11 U.S.C. § 702(b), the Court may
determine that these votes should not be included. *See* McAbee Declaration ¶ 8 n.1.

¹⁸ For purposes of Scenario #1A, votes by Chunqing Cheng and Johanna Fogl, claim #33 were not counted
because these claims were not scheduled. However, the twenty percent minimum threshold is met even without
considering these two claims. *See* McAbee Declaration ¶ 8 n.2.

1 eligible claims requesting the election and voting under Section 702. *Id.* Under scenario #1B, the
2 election would not have been authorized under Section 702 and the interim trustee, Kari Bowyer
3 would become the permanent chapter 7 trustee. *Id.*

4 **2. Scenario #2**

5 The second scenario for determining whether the threshold has been met relies solely on the
6 actual proof of claims filed as of the date of the Chapter 7 Trustee Election. *See In re Lake State*
7 *Commodities, Inc.* 173 B.R. at 642 (in determining the amount that should be used to calculate the
8 base of eligible claims, the court found that the “amount listed on the face of the proofs of claim
9 should govern”). *But see In re San Diego Symphony Orchestra Assn.*, 201 B.R. 978, (Bankr. S.D.
10 Cal. 1996) (the court disagreed with *Lake State Commodities* finding that “[s]uch a result is contrary
11 to the congressional purpose of ensuring meaningful creditor participation in the process because
12 the fewer claims are filed, the smaller the universe, and the smaller number of votes actually cast
13 would be necessary for an election”). Under this scenario, in calculating the universe of claims, the
14 Court does not consider or rely on schedules to compute the base of eligible claims. *See In re Lake*
15 *State Commodities, Inc.* 173 B.R. 642 at 648 (court finding that “although some courts may rely on
16 the debtor’s schedules to compute the base of eligible claims, there is nothing in Section 702 or the
17 Bankruptcy Code to indicate that the schedules are more accurate than the proofs of claims”). *See*
18 *also In re Michelex*, 195 B.R. at 993 (“[t]he opinion in *Lake States Commodities*, which adopts a
19 restrictive universe of claims, completely disregards the legislative history which refers to
20 “scheduled” claims.”). In this case, the deadline for filing claims is April 22, 2022. *See* ECF Docket
21 generally.

22 Under this scenario, the U.S. Trustee calculates the minimum threshold for requesting the
23 election and voting in the election to be 20% of the amount of non-priority unsecured debt not held
24 by insiders, as set forth only on the claims register, not including claims designated as contingent,
25 unliquidated, or disputed. *See* McAbee Declaration ¶ 8 and **Exhibit D, Scenario #2**.

1 Excluding priority, secured, or duplicated claims, the total claims filed aggregate
2 \$7,515,532.21. *Id.* Twenty percent of this amount was calculated to be \$1,503,106.44. *Id.* Under this
3 scenario, the only eligible claim was the \$356,619.08 claim filed by Paul Harms, which claim
4 amount does *not* satisfy the 20% minimum threshold or the approximately \$1,503,106.44 minimum
5 dollar amount of eligible claims requesting the election and voting under Section 702. *Id.* Under
6 scenario #2, the election would not have been authorized under Section 702 and the interim trustee,
7 Kari Bowyer would become the permanent chapter 7 trustee. *Id.*

8
9 **a. Scenario #2A**

10 Alternatively, if the Court determines that the Debtor's verbal objections are invalid, then it
11 appears that all claims as filed were eligible to request the election and vote under Section 702. *See*
12 McAbee Declaration ¶ 8 and **Exhibit D, Scenario #2A**. According to the U.S. Trustee's calculations,
13 excluding priority, secured, or duplicated claims, the total claims filed under this scenario aggregate
14 \$37,468,912.58.¹⁹ *Id.* Twenty percent of this amount was calculated to be \$7,493,782.52. *Id.* Under
15 this scenario, all proof of claims as filed were deemed eligible to request and vote in the election to
16 the extent they were not asserting priority, secured, or duplicated claim. *Id.* The aggregate claim
17 amount for the voting creditors is \$24,822,932.68, which *does* satisfy the \$7,493,782.52 minimum
18 threshold. *Id.* Under scenario #2A, the election would have been authorized under Section 702 and
19 Richard Marshack would become the permanent chapter 7 trustee. *Id.*

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22 **b. Scenario #2B**

23 Again, the Court could also determine that, although the Debtor listed the claims of Johanna
24 Fogl, claim #28 and Rishi Bhargava and Shweta Goyal, claim #32 as disputed and unliquidated on
25 the Second Amended Schedules, the Debtor did not verbally object to these claims. In fact, when
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¹⁹ The "voting creditors' claims" calculation of \$37,468,912.58 includes ballots provided by David Heyman and Tod Fukushima/Lourdes Martinez. These votes are counted because while these creditors attended the Chapter 7 Trustee Election and left early without verbally requesting an election and voting, they returned a ballot. Although the U.S. Trustee is including these claims under scenario #2A, under a strict reading of 11 U.S.C. § 702(b), the Court may determine that these votes should not be included. *See* McAbee Declaration ¶ 8 n.3.

1 asked whether anyone objected to these claims, the responded that it has no objection to the Fogl
2 claim #28. *See* Dutchints Election Transcript, **Exhibit A**, pp. 58-63. In addition, the Debtor was
3 silent and did not object to the Bhargava and Goyal claim #32. *See* Dutchints Election Transcript,
4 **Exhibit A**, pp. 154-161.

5 According to the U.S. Trustee's calculations, excluding priority, secured, or duplicated
6 claims, the total claims filed under this scenario aggregate \$8,759,720.21. *See* McAbee Declaration
7 ¶ 8 and **Exhibit D, Scenario #2B**. Twenty percent of that amount equals approximately
8 \$1,751,944.04. *Id.* Under this scenario, eligible claims were: (1) a \$356,619.08 proof of claim filed
9 by Paul Harms; (2) a \$300,000 proof of claim filed by Johanna Fogl; and (3) a \$944,188 proof of
10 claim (not including the priority amount) filed by Rishi Bhargava and Shweta Goyal. *Id.* The
11 aggregate claim amount for these three claims is \$1,600,807.08, which does *not* satisfy the 20%
12 minimum threshold or the approximately \$1,751,944.04 minimum dollar amount of eligible claims
13 requesting the election and voting under Section 702. *Id.* Under scenario #2B, the election would
14 not have been authorized under Section 702 and the interim trustee, Kari Bowyer would become the
15 permanent chapter 7 trustee. *Id.*

16 **3. Scenario #3**

17 A third scenario for determining the universe of claims relies upon the Second Amended
18 Schedules, with further adjustments made by the proofs of claims actually filed. *See In re Michelex*,
19 195 B.R. at 993 (“[w]hen a proper proof of claim is filed before, or at, the § 341 meeting, it
20 supersedes the debtor’s schedules. The universe of claims must be adjusted by the proofs of claims
21 actually filed”). Under this scenario, the U.S. Trustee calculates the minimum threshold for
22 requesting the election and voting in the election to be 20% of the amount of unsecured debts not
23 held by insiders, as set forth on Schedule F, with further adjustments made by the proofs of claims
24 actually filed, not including debts designated as contingent, unliquidated, or disputed, or were
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disputed at the Chapter 7 Trustee Election. *See* McAbee Declaration ¶ 8 and **Exhibit D, Scenario #3**.

Using this analysis, the total qualifying claims aggregate \$11,815,283.13. *Id.* Twenty percent of that amount was calculated to be \$2,363,056.63. *Id.* Under this scenario, the only eligible claim was the \$356,619.08 proof of claim filed by Paul Harms. *Id.* This amount does *not* satisfy the 20% minimum threshold that requires at least \$2,363,056.63 of eligible claims requesting the election and voting under Section 702. *Id.* Under scenario #3, the election would not have been authorized under Section 702 and the interim trustee, Kari Bowyer would become the permanent chapter 7 trustee. *Id.*

a. Scenario #3A

Alternatively, if the Court determines that the Debtor's verbal objections are invalid, then it appears that all claims were eligible to request the election and vote under Section 702. *See* McAbee Declaration ¶ 8 and **Exhibit D, Scenario #3A**. According to the U.S. Trustee's calculations, excluding priority, secured, or duplicated claims, the total of all qualifying claims filed under this scenario aggregate \$41,768,663.50.²⁰ *Id.* Twenty percent of this amount was calculated to be \$8,353,732.70. *Id.* Under this scenario, all claims as filed were deemed eligible to request and vote in the election. *Id.* The aggregate claim amount for the voting creditors is \$24,822,932.68, which *does* satisfy the \$8,353,732.70 minimum threshold. *Id.* Under scenario #3A, the election would have been authorized under Section 702 and Richard Marshack would become the permanent chapter 7 trustee. *Id.*

²⁰ The "voting creditors' claims" calculation of \$41,768,663.50 includes ballots provided by David Heyman and Tod Fukushima/Lourdes Martinez. These votes are counted because while these creditors attended the Chapter 7 Trustee Election and left early without verbally requesting an election and voting, they returned a ballot. Although the U.S. Trustee is including these claims under scenario #3A, under a strict reading of 11 U.S.C. § 702(b), the Court may determine that these votes should not be included. *See* McAbee Declaration ¶ 8 n.4.

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b. Scenario #3B

As stated above, the Court could also conclude under this scenario that, although the Debtor listed the claims of Johanna Fogl, claim #28 and Rishi Bhargava and Shweta Goyal, claim #32 as disputed and unliquidated on the Second Amended Schedules, the Debtor did not object to these claims. In fact, when asked whether anyone objected to these claims, the Debtor responded that it has no objection to the Fogl claim #28. *See* Dutchints Election Transcript, **Exhibit A**, pp. 58-63. In addition, the Debtor was silent and did not object to the Bhargava and Goyal claim #32. *See* Dutchints Election Transcript, **Exhibit A**, pp. 154-161.

According to the U.S. Trustee's calculations, excluding priority, secured, or duplicated claims, total qualifying claims aggregate \$13,059,471.13. *See* McAbee Declaration ¶ 8 and **Exhibit D, Scenario #3B**. Twenty percent of that amount equals approximately \$2,611,894.23. *Id.* Under this scenario, eligible claims were: (1) a \$356,619.08 proof of claim filed by Paul Harms; (2) a \$300,000 proof of claim filed by Johanna Fogl; and (3) a \$944,188 proof of claim (not including the priority amount) filed by Rishi Bhargava and Shweta Goyal. *Id.* The aggregate claim amount for these three claims is \$1,600,807.08, which does *not* satisfy the 20% minimum threshold or the approximately \$2,611,894.23 minimum dollar amount of eligible claims requesting the election and voting under Section 702. *Id.* Under scenario #3B, the election would not have been authorized under Section 702 and the interim trustee, Kari Bowyer would become the permanent chapter 7 trustee. *Id.*

B. Continued Meeting of Creditors

As stated on the record, the meeting was adjourned to April 26, 2022, at 1:00 p.m.

III. CONCLUSION

For the foregoing reasons, the U.S. Trustee submits this Report of Disputed Election of Trustee as required by 28 U.S.C. § 586(a)(3) and Rule 2003(d) and has caused this report to be delivered to all parties who requested it. If a motion to resolve the election controversy set forth in

1 this report is not filed within the requisite time, Kari Bowyer shall serve as the permanent trustee in
2 this case, pursuant to Rule 2003(d)(2).

3
4 Date: April 11, 2022

Respectfully Submitted,
5 TRACY HOPE DAVIS
6 United States Trustee for Region 17

7 By: /s/ Elvina Rofael
8 Elvina Rofael
9 Trial Attorney for the United States Trustee
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